March 22, 2000

FAA-00-7018-17

BY HAND DELIVERY
Honorable Nicholas G. Garaufis
Chief Counsel
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Dear Mr. Garaufis:

The undersigned counsel represent foreign air carriers that may be subject to fees that the FAA plans to impose for air traffic control and other services provided to such carriers during certain flights through U.S.-controlled airspace. In ***Asiana Airlines, et al. v. Federal Aviation Administration,*** 134 F.3d 393 (D.C. Cir. 1998), the Court of Appeals granted a petition filed by these same foreign carriers challenging the FAA's Interim Final Rule that established an initial fee schedule in 1997. The Court vacated the fee schedule "in its entirety" and remanded the matter to the FAA "for further proceedings consistent with this opinion." *Id.* at 403.

The FAA has recently published a notice of its intent to adopt a second Interim Final Rule without an opportunity for prior comment as required by the Administrative Procedure Act (APA), 5 U.S.C. § 553. 65 Fed. Reg. 12613 (Mar. 9, 2000). The FAA proposes to receive comments on the Interim Final Rule after its adoption and to consider such comments before implementation of a Final Rule. *Id.* The recent FAA notice includes the wording of a form letter from the Assistant Administrator for Financial Services to "'Users of Certain Overflight ATC Services" that states in relevant part: "While the Interim Final Rule process is not the customary rulemaking approach used by the FAA, it is required by law for this particular rulemaking." *Id.*

To the contrary, not only is the FAA under no requirement to proceed by Interim Final Rule, it has no evident authority to do so. In the *Asiana* decision the Court of Appeals indicated that APA procedures, not an *ad* hoc Interim Final Rule process, apply to future proceedings with respect to overflight fees. Whatever authority the FAA had to avoid notice and comment rulemaking is derived from 49 U.S.C. § 45301(b)(2), which provides that "[t]he Administrator shall publish in the Federal Register an initial fee schedule and associated collection process as an interim final rule . . . ." In upholding the FAA's decision to publish the initial fee schedule by Interim Final Rule, the Court of Appeals concludes,

> The FAA followed that congressional intent *as* far *as* it went. ***It is probably the case that once the FAA issued the IFR, the APA*** once ***again became controlling for all subsequent proceedings,*** but that is not the question before us.

134 F.3d at 398 (emphasis added).

Thus, the authority of the FAA to proceed by Interim Final Rule expired upon its publication of the initial fee schedule in the 1997 Interim Final Rule. Accordingly, section 553 of the APA, which requires notice-and-comment procedures (subject to certain exceptions not

applicable here), applies to any subsequent FAA proceedings to implement the governing statute, 49 U.S.C. § 45301.

The Court of Appeals specifically recognized that section 559 of the APA requires that any legislative exception to the terms of the APA must be express. 134 F.3d at 397. In particular, exceptions from the notice and comment requirements of section 553 "must be 'narrowly construed and only reluctantly countenanced' in order to assure 'that an agency's decisions will be informed and responsive.'" *Id.* at 396 (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)). In examining whether section 45301 provided a clear and express congressional direction to dispense with the APA-required notice and comment procedures, the Court of Appeals focused on the language in § 45301 authorizing the FAA "to recover in fiscal year 1997 $100,000,000[,]" citing 49 U.S.C. § 45301(b)(1)(A).

> This language, along with the statutory directive that the IFR specify procedures for collecting fees, demonstrates that the statute contemplated that the IFR would be issued and implemented during fiscal year 1997. Given that the Act was not passed until after the beginning of fiscal 1997, the agency had to move quickly to establish a fee schedule and collection process in order to fulfill this statutory goal.

134 F.3d at 398.

The FAA did publish the initial fee schedule in fiscal 1997 pursuant to an Interim Final Rule, and the FAA proceeded to collect overflight fees throughout the remainder of fiscal 1997 In January 1998, however, the Court of Appeals vacated the "initial fee schedule" that was the product of the original Interim Final Rule process. Thus, any revised fee schedule that the FAA adopts on remand will not be an "initial fee schedule," subject to the Interim Final Rule process.

The urgency that justified an exception to the normal notice and comment rulemaking procedures in 1997 no longer applies. Fiscal Year 1997 has long since ended, and with it the specific congressional directive to collect overflight fees during that year. The deliberate manner in which the FAA has acted on this matter, taking more than two years to issue a second fee schedule, itself demonstrates the lack of any real or legislatively imposed urgency with respect to the FAA's establishment of a revised overflight fee schedule.

Congress has given no indication in subsequent legislation or legislative history that the FAA remains under an expedited rulemaking timetable to establish an overflight fee schedule or even that it expects the FAA to act within a certain time. In fact, Congress has directed the FAA to develop a modern, reliable cost accounting system, which, as FAA itself has recognized, must necessarily precede the imposition of user fees. Considering that the FAA has spent nearly two years developing thatsystem and is apparently still in the process of doing so (see, e.g., Office of Inspector General Report FE-2000-024 (Dec. 17, 1999)), there is simply no basis for the FAA now to rush the rulemaking process by sidestepping the standard notice and comment requirements of the APA.

Apart from the letter of the APA, the compelling public policy reasons that have provided the basis for APA procedures for over fifty years are no less applicable to the FAA in this proceeding. Affording affected parties a meaningful opportunity to comment on the FAA's

proposed fee schedule *before* it is **effective,** coupled with the benefit to the FAA of the substantive points raised, will product not only more informed agency **decisionmaking** but also a reduced likelihood of controversy over the end result.

For **the** foregoing reasons, the FAA should abandon any intention to proceed by Interim Final Rule and instead publish a Notice of Proposed Rulemaking in compliance with section **553** of the Administrative Procedure Act.

Respectfully submitted,

Robert W. Kneisley
Law Offices of Robert W. Kneisley, L.L.C.
1250 Eye Street, NW
Washington, **D.C.20005**
Counsel *to Air Transport Association of* Canada
Petitioner in D.C. Cir. No. 97-1360

Frederick S. Hird, Jr.
1850 M Street, NW, Suite **280**
Washington, **D.C.20036**
Counsel *to LTU Luftransport-Unternehmen GmbH.*
Petitioner in D.C. Cir. No. 97-1357

Moffett B. Roller
Roller & Bauer, PLLC
1020 Nineteenth Street, NW, Suite **400**
Washington, **D.C. 20036**
Counsel to Qantas Airways Limited
Petitioner in **D.C. Cir.** No. **97-1358**

Don H. Hainbach
Boros & Garofalo, P.C.
120 1 Connecticut **Ave., NW,** Suite **700**
Washington, **D.C. 20036**
Counsel to British Airways PLC
Petitioners **in D.C. Cir. No. 97-1359**

Joseph E. Schmitz
Gregory S. Walden
Patton Boggs LLP
2550 M Street, NW
Washington, **D.C. 20037**
Counsel to Asiana Airlines
Petitioner in D.C. Cir. No. **97-1356**

Susan Gotbetter
Fulbright & Jaworski L.L.P.
666 Fifth Avenue
New York, New York **10103**
Counsel *to Air New Zealand Limited*
Petitioner in D.C. Cir. No. 97-1362

Paul Mifsud
Monique R **Sears**
KLM Royal Dutch Airlines
2501 M Street, NW, Suite **612**
Washington, DC. **20037**
Petitioner in D.C. Cir. No. 97-1363

Karan Bhatia
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, **D.C. 20037-1420**
Counsel to Deutsche Lufthansa AS.
Petitioner in D.C. Cir. No. **97-1364**

Copy to: Donna McLean